No. 12,368

IN THE

United States Court of Appeals

For the Ninth Circuit

CLARK SQUIRE, United States Collector of Internal Revenue for the State of Washington, *Appellant*, vs. PUGET SOUND PULP & TIMBER CO., *Appellee*.	

Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR APPELLEE.

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vs.

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BRIEF FOR APPELLEE.

OPINIONS BELOW.

The opinion of the District Court (R. 83-96) is not reported.

JURISDICTION.

This action arises under the Internal Revenue Laws of the United States and was brought pursuant to Section 24 of the Judicial Code, U.S.C. Title 28, Section 41(5) (now Title 28, United States Code, Section

1340) for the recovery of interest of $11,640.98 assessed against and collected from the plaintiff. (R. 2, 99.)

This interest of $11,640.98 was interest for the period March 15, 1943 to August 29, 1944 computed at the rate of 6% per annum upon an assessment of excess profits taxes for the year 1942. (R. 99.) This interest was collected by the defendant from the plaintiff on November 30, 1944. (R. 99.) After paying the interest the plaintiff filed a claim for the refund of said interest (R. 102) and after the claim was rejected by the Commissioner of Internal Revenue, this suit was duly filed. (R. 102.)

The District Court entered judgment in favor of the plaintiff on July 11, 1949. (R. 105-106.) Defendant filed notice of appeal on August 19, 1949, pursuant to the provision of Title 28, United States Code, Section 1291.

QUESTION PRESENTED.

Where payment of a portion of the excess profits taxes disclosed by the taxpayer on its excess profits tax return for the year 1942 was deferred under the provisions of Section 710(a)(5) of the Internal Revenue Code because the taxpayer made a claim for relief under Section 722 of the Internal Revenue Code (and which claim the Court found was filed in good faith), and the Commissioner of Internal Revenue later proposed a rejection of the Section 722 relief claim

and assessed the deferred tax, and payment of said tax was thereupon demanded by and paid to, the Collector of Internal Revenue, was the taxpayer required to pay interest on the deferred tax for the period from March 15, 1943 (the due date for the filing of the 1942 tax return) to September 30, 1944, the date of the demand for the payment of the deferred tax?

STATUTES INVOLVED.

The pertinent statutes will be found in the Appendix, infra.

STATEMENT.

The facts were not in dispute—the pertinent facts were found (R. 99-102) as follows:

Plaintiff taxpayer (appellee in this proceeding) duly filed its income and excess profits tax return for the calendar year 1942 claiming the benefits of Section 722 of the Internal Revenue Code which section allowed relief through reduction of excess profits taxes if the requirements of that section could be satisfied. The claim for the benefits of Section 722 was a *bona fide* claim and was made in good faith. (R. 100, para. 7.)

The taxpayer reported on said return an adjusted excess profits net income (without reference to Section 722) of $1,884,586.83, and a normal tax net income (computed without the credit provided in Section

26(e) of the Internal Revenue Code) of $2,533,133.02. The reduction in excess profits tax which the taxpayer claimed should be allowed under Section 722 was $409,707.16. (R. 100.) Under Section 710(a)(5) of the Internal Revenue Code, the taxpayer was entitled to defer the payment of excess profits taxes up to 33% of the amount of the claimed reduction, so pursuant to this statute, the taxpayer elected to and did defer the payment of $135,203.36 (33% of $409,-707.16) of its excess profits taxes for the year 1942. (R. 100-101.) After reducing its excess profits tax by this deferred amount and by an allowable credit of $150,000 not in issue, the taxpayer showed on its return an excess profits tax liability of $1,410,924.79 which was duly paid. (R. 101.)

On August 29, 1944 the Commissioner of Internal Revenue determined that the taxpayer was not entitled to relief under Section 722 of the Internal Revenue Code, rejected the claim for relief under Section 722, and assessed against the taxpayer additional excess profits taxes for the year 1942 in the amount of $179,199.48 which included the aforesaid $135,203.36, payment of which had been deferred as aforesaid. (R. 101, para. 12.) On September 30, 1944, the defendant, the Collector of Internal Revenue, gave notice and demand upon the taxpayer for payment of this tax and interest thereon. (R. 101, para. 14.)

On October 14, 1944 the taxpayer paid to the defendant, the Collector of Internal Revenue, the said additional taxes and all interest thereon excepting the

interest in the sum of $11,640.98 which was the interest up to August 29, 1944 on the deferred tax of $135,203.36 and which interest was not paid to the Collector until November 30, 1944. (R. 101, para. 13; R. 99, para. 3.)

The District Court held with the taxpayer that interest on the amount of the deferred tax of $135,-203.36 did not start to run until the Commissioner rejected the claim for relief and the Collector made demand upon the taxpayer for the payment of said deferred tax, and therefore the interest collected in the amount of $11,640.98 should be refunded. (R. 102-103.) Judgment in favor of the taxpayer was rendered accordingly. (R. 105.)

SUMMARY OF ARGUMENT.

The opinion of the Judge of the United States District Court, Honorable Lloyd L. Black, in this case, found in pages 83 to 96 of the Transcript of Record, in an excellent summary of the argument not only in support of the taxpayer's position but also in refutation of the appellant's arguments; and the Court's conclusions of law (R. 102-103) sustain the taxpayer's contentions.

The taxpayer's position (with reference to Internal Revenue Code sections) briefly stated is:

A. The time prescribed for payment of the portion of the tax deferred under Section 710(a)(5) is the date of the Collector's notice and demand for payment of said tax. (R. 102-103.)

1. The taxpayer was not liable for the deferred tax at the time the return was due. (Section 710(a)(5).

2. The deferred tax was not payable at the time the return was due. Although the tax statute prescribes in effect that time for payment of the correct tax liability is the due date for filing the tax return and interest on any understatement of tax will be collected from the due date of the return because that is the date prescribed for payment of the correct tax, Section 710(a)(5) provides specifically that "the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33% of the amount of the reduction in the tax so claimed" under Section 722.

3. The taxpayer became liable for the deferred tax only after rejection of its Section 722 claim for relief, at which time the tax was assessable as a tax "deficiency". (Section 710(a)(5).)

4. A "deficiency" must be paid upon notice and demand from the Collector (Section 272(b) and (c)) and since Section 710(a)(5) specifically declares that the due date of the return is not the time "prescribed for payment" of this deferred tax, the only other time prescribed for payment of the tax is the time of the notice and demand from the Collector.

B. Interest on the deferred portion of the tax starts to run only from the date prescribed for pay-

ment of said tax, which is the date of the Collector's notice and demand. (R. 102-103.)

5. Interest on a tax deficiency is chargeable from the "date prescribed for the payment of the tax" to date of payment. (Section 292(a).)

6. Since the only date "prescribed for payment" of the deferred tax is the date of the collector's notice and demand for payment of the tax after the Commissioner of Internal Revenue has acted on the taxpayer's claim for relief, interest on such tax can start to run only from the date of the notice and demand.

The appellant's position as stated on page 5 of his brief, is "that the court erred in granting judgment for taxpayer for the interest paid, on the ground that Section 292(b) of the Internal Revenue Code, providing that no interest shall be assessed or collected on a deficiency determined by the Commissioner to be attributable to the final determination of an application for relief under Section 722 of the Code, was applicable only where the application for relief was granted, and on the further ground that even if Section 292(b) of the Code applies where the application for relief is denied, excess profits taxes deferred under Section 710(a)(5) of the Code is specially excluded from the non-interest provisions of Section 292(b) of the Code."

This contention of the Government that Section 292(b) applies makes a very complicated matter out

of what the taxpayer believes is not too complex. The taxpayer believes that Section 292(b) is not applicable to the issue involved in this case because of a specific exclusion within the section itself of taxes deferred under Section 710(a)(5), and argument will be presented herein answering all the arguments advanced by the appellant in his brief.

ARGUMENT.

INTRODUCTORY STATEMENT.

The appellee will first submit argument in support of its position as presented to and sustained by the Court below, and then will submit argument in refutation of the Government's arguments advanced in appellant's brief filed in this proceeding.

The excess profits tax was imposed at the rate of ninety per cent upon all net income in excess of the credit allowed by law. Congress realized that such a tax would be discriminatory against certain corporate taxpayers which had inadequate credit. For the purpose of avoiding or at least mitigating such discrimination Congress made provision for a constructive credit for those corporations which came within the provisions of Section 722 of the Internal Revenue Code. Since the relief under Section 722 was available only after payment of the tax and upon application for refund, it was considered that in order to make the relief of practical benefit a provision should be made for the deferment of a portion of the excess

profits tax under certain circumstances when more than fifty per cent of the corporation's income was subject to excess profits tax. In such connection such Section 710(a)(5) of the Internal Revenue Code was enacted. Such section gave to the corporation within its terms the right of deferring an amount equal to thirty-three per cent of the reduction claimed.

Appellee taxpayer in connection with the 1942 tax was within the provisions of Section 710(a)(5) and elected to reduce the amount of excess profits tax otherwise payable by it by thirty-three per cent. The amount of this reduction was $135,203.36. The Court found as a matter of fact that the taxpayer's claim for relief under Section 722 was a bona fide claim and was made in good faith and taxpayer believed and under the evidence had the right in all honesty to believe that it was entitled to the relief it claimed. (R. 86.)

On August 29, 1944 the Commissioner of Internal Revenue rejected the taxpayer's claim for relief under Section 722[1] and on September 30, 1944, the Collector of Internal Revenue made demand upon the taxpayer for payment of the deferred tax with interest at 6% per annum from March 15, 1943, the due date for the filing of the 1942 tax return. The propositions upon which the taxpayer relies in support of its contention that the said interest was erroneously and illegally assessed and collected and should be refunded, are stated in the foregoing summary of argument.

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[1]Taxpayer has filed an appeal from this action to the Tax Court of the United States, and the case is awaiting trial. (R. 37-38.)

No decision, other than the decision of the Court below in this case, has been found in which the issue involved in this proceeding has been considered or decided.

THE TIME PRESCRIBED FOR PAYMENT OF THE PORTION OF THE TAX DEFERRED UNDER SECTION 710(a)(5) IS THE DATE OF THE COLLECTOR'S NOTICE AND DEMAND FOR PAYMENT OF SAID TAX.

The excess profits tax for the year 1942 was imposed by Section 710(a) of the Internal Revenue Code. The sections of the Code which pertain to the excess profits tax do not specifically provide for the filing of returns or for the payment of the tax but incorporate by reference the general provisions pertaining to income taxes. (See Internal Revenue Code, Section 729.) Under the provisions of Sections 53 and 56 of the Internal Revenue Code the excess profits tax return was required to be filed on March 15, of the year following the taxable year and the excess profits tax was payable on March 15 or in quarterly installments on March 15, June 15, September 15 and December 15 of the year succeeding the taxable year. Thus in the case of corporations which made their returns on the basis of the calendar year, as did appellee, March 15, 1943 was the date prescribed for the payment of the excess profits tax for 1942 except that taxpayers had the privilege of paying the tax in quarterly installments as mentioned above. (Code sections referred to herein are set out in the appendix hereto.)

While March 15, 1943 was the date "prescribed for payment" of taxpayer's excess profits tax for 1942, it was not the date prescribed for payment of the portion of the tax ($135,203.36) which the taxpayer was permitted to defer under the provisions of Section 710(a)(5) of the Internal Revenue Code for said section specifically provided "the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the reduction in the tax so claimed". Section 710(a)(5) did not specify a date for the payment of the portion of the tax deferred thereunder in the event of a determination that such deferred portion was payable. Said section did provide, however, that "For the purposes of Section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return" and said quoted provision when considered together with Section 271 which defines "deficiency" as "* * * the amount by which the tax imposed by this chapter exceeds * * * the amount shown as the tax by the taxpayer upon his return * * *" had the effect of including such deferred portion of the excess profits tax within the definition of "deficiency". The only provision for the payment of a deficiency is contained in Section 272 which provides that a deficiency "shall be paid upon notice and demand from the Collector". (See Section 272, subdivisions (b) and (c).)

On the basis of the foregoing analysis of the law it is respectfully submitted that the time prescribed for payment of the portion of the tax deferred under the

provisions of Section 710(a)(5) is the date of notice and demand by the Collector, and the Court below was correct in so deciding.

INTEREST ON THE DEFERRED PORTION OF THE TAX STARTS TO RUN ONLY FROM THE DATE PRESCRIBED FOR PAYMENT OF SAID TAX, WHICH IS THE DATE OF THE COLLECTOR'S NOTICE AND DEMAND.

As the portion of the excess profits tax deferred under the provisions of Section 710(a)(5) was by that section specifically brought within the classification of a deficiency in the event said deferred portion was later determined to be payable, it is necessary to examine the provision with regard to interest on deficiencies to determine the interest payable upon the deferred excess profits tax. Section 292 of the Internal Revenue Code makes provision for interest on deficiencies and provides "Interest upon the amount determined as a deficiency * * * shall be collected as a part of the tax, at the rate of 6 per centum per annum *from the date prescribed for payment of the tax* (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, * * *" (Italics supplied.)

It is clear from the foregoing quotation that interest is payable on a deficiency only *from the date prescribed for payment of the tax.* It is also clear from the provisions of Section 710(a)(5) that the regular time prescribed for payment of the excess profits tax is not applicable to the portion of the tax deferred under

Section 710(a)(5) and that the only time prescribed for the payment of such deferred portion of the tax is the date of the notice and demand by the Collector.

It must necessarily follow, therefore, that interest is chargeable upon the deferred tax only from the date of the Collector's notice and demand for payment of said tax, and the Court below is correct in so deciding.

THERE IS NOTHING IN THE LEGISLATIVE HISTORY OF THE STATUTORY PROVISIONS HEREIN DISCUSSED, OR IN THE TAX STATUTES, WHICH IS INCONSISTENT OR CONTRADICTORY OF THE CONCLUSIONS HEREINABOVE EXPRESSED.

Generally speaking the mechanics of tax computation results in this situation—where the income subject to excess profits tax is reduced (as for example because of an increase in the excess profits tax credit through the application of Section 722), thus reducing the excess profits tax, the income subject to income tax, and the income tax, is increased because the income subject to income tax is the net income *less* the income subject to excess profits tax. Since the law provided that no interest is to be paid on refunds as the result of Section 722 (Section 3771(g) of the Internal Revenue Code), it would seem fair that a corollary provision should be set forth in the statute to exempt the resultant income tax deficiency from a charge for interest. Such a corollary provision is contained in Section 292(b) of the Internal Revenue Code.

Section 292(b) provides that "if any part of a deficiency for a taxable year beginning after December

31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under Section 722 * * * no interest shall be assessed or paid with respect to such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later", *and then, by a parenthetical provision, the section is declared to be non-applicable to a deficiency constituting a deficiency by reason of deferment of tax under Section 710(a)(5).* However, the Senate Finance Committee Report on Section 2 of H. R. 3363 (also cited by appellant in his brief) which added subsection (b) to Section 292 of the Internal Revenue Code (Public Law 201, Chapter 346, Act of December 17, 1943—78th Congress, 1st Session) contains the following statement:

> "In general, a taxpayer must pay its tax, computed without any benefit from the application of Section 722. Since, under the bill, taxpayers which have paid their taxes in full, without the application of Section 722, will receive any refunds with interest only for the periods provided, taxpayers who have availed themselves of the deferment provided by Section 710(a)(5) should be required to pay interest on the amount by which they have underpaid."

It is difficult to understand this statement; first, because it compares the status of taxpayers who will receive refunds under Section 722 with taxpayers whose claims for refund under Section 722 are rejected; second, because Section 292(b) specifically excludes from its applicability the matter of interest on

deficiencies by reason of deferment under Section 710(a)(5); and third, because it contains no direct statement about how the interest on such deficiencies should be computed either as to the specific date from which interest should be charged or the date that the deferred portion of the tax becomes payable. At first reading the statement appears to indicate that the interest should be charged from the due date of the return, but since that is not specifically stated in the report, and is certainly not so stated in the statute, there is real doubt as to whether that was intended. The doubt is even further emphasized when it is considered that the statute actually condones a possible discrimination in cases where claims under Section 722 are allowed. In other words, a person who defers his tax under Section 710(a)(5) and later has his claim for relief under Section 722 allowed in full, has had the use of the deferred money at all times; whereas the person who did not defer any tax under Section 710(a)(5) and who later has his claim for relief under Section 722 allowed in full, is given a refund because he paid the tax when he filed his return instead of deferring it, *but the refund is without interest* so that that person has been deprived of the use of money without compensation from the time he paid it upon the filing of his return to the time it was refunded to him (Section 3771(g) Internal Revenue Code). This certainly indicates that Congress did not consider this possible discrimination between persons who did defer and persons who did not defer in so far as the payment of interest on refunds is concerned, as objection-

able. Since Congress did not see fit to distinguish between persons who deferred payment under Section 710(a)(5) and persons who did not in regard to payment of interest *to them* where a claim for relief under Section 722 was allowed, it would seem likely that Congress did not intend to create any distinction between those persons in regard to payment of interest *by them* where a claim for relief under Section 722 was rejected. It must be kept in mind that all taxpayers who qualified were given the right to defer a part of the tax under Section 710(a)(5) so that all taxpayers had the opportunity at least of being on an equal plane.

In view of the uncertainty as to just what the Senate intended to convey by the statement above quoted, the decision of the question here involved must depend exclusively upon the statute as it is written. Section 292(b) is clear in excluding from its application interest on taxes deferred under Section 710(a)(5). Section 292(b) is clear in that it is absolutely silent as to whether or not interest is collectible on a deficiency by reason of deferment of tax under Section 710(a)(5). Other statutory provisions are clear as hereinbefore established, supra pp. 11-12 to the effect that the deferred tax is not payable until the date of notice and demand by the Collector for payment of the tax and that interest thereon does not start to run until that date. It is also clear that there is no other date prescribed in the statute for the payment of a tax deferred under Section 710(a)(5). The confusion is

caused not by the statute but by the Congressional reports.

No better case than this could be found for the application of the well established doctrine that Congressional reports may be resorted to to determine the meaning of a statute only when the statute is ambiguous in its wording or meaning. In the case of *Crossett Western Co.* (1945), 9 T. C. 783, which involved the interpretation of Section 718(b)(3) of the Internal Revenue Code, the Government presented the same argument as to proper statutory construction as is presented by appellee here. The Tax Court, in stating the Government's contention said, "The respondent contends that resort may not be had to the Committee reports for construction of the statute; that, standing by itself, the statute is clear and unambiguous; and that if any ambiguity exists it is caused by reference to the reports." The Tax Court sustained the Commissioner's position concluding that,

> "While resort may be had in some circumstances to the legislative history to find the Congressional intent, when Congress has spoken in clear and unambiguous language the normal and reasonable meaning of an act is not to be argued to one side in favor of a construction made possible only by the distortion or disregard of such plain language."

The *Crossett* case was appealed to the Court of Appeals for the Third Circuit who affirmed the Tax Court (1946—155 F.(2d) 433), concluding, after reviewing the legislative history of the Act, "we agree with the

Tax Court that the clear language of the statute specifically governs the situation before us.''

In this case the Government is doing the very thing it criticized in the *Crossett* case in referring to an ambiguous Congressional report and giving it a meaning not apparent from its text to justify an interpretation of a statute contrary to the unambiguous wording of the statute. There is absolutely no justification for such a practice in the rules for statutory construction.

The Court below after carefully considering the legislative history of Section 292(b) concluded:

> ''Therefore if the law had been left as the House Committee recommended it, the defendant not only would not have been able to have collected interest from March 15, 1943, but would not have been able to have collected interest from the plaintiff until a period beginning September 16, 1945. But if the provision of the law as it is is clear, equitable and consistent as to 1940 and 1941, it is difficult for me to comprehend how it would be unfair not to begin interest on the 1942 taxes as of March 15, 1943. The Senate Committee report does not say that the interest is to be chargeable from March 15, 1943. It merely says that by the amendment interest will be chargeable on the deficiency. Since it says no more, clearly, that interest will begin when it should begin according to law.
>
> Plaintiff says that according to the clear statement of the law the interest does not begin until it is payable. The Senate Committee report does not disagree with that contention. The House Committee report in no wise disagrees with that

contention. I am satisfied that the law is as plaintiff contends, that interest was not chargeable until the deferred deficiency became payable. Under the law the deferred deficiency became payable in September, 1944, when the Commissioner demanded payment." (R. 92-93.)

THAT THE DATE PRESCRIBED FOR PAYMENT OF A TAX CAN BE A DATE OTHER THAN THE MARCH 15 DATE FOR FILING OF A RETURN HAS BEEN RECOGNIZED.

This question of whether the date prescribed for payment of a tax can be anything other than the March 15th date for filing of a return has already been considered in a somewhat analogous situation. Under Section 6(e)(1) of the Current Tax Payment Act of 1943 the taxpayer was given the right to elect (as Section 710(a)(5) does) to secure the benefits of a twelve-month extension for payment of one-half of the 25% increase in the 1943 tax in connection with the partial forgiveness of 1942 tax liabilities. The section provided further:

> "If such amount is not paid on or before the date on which it is payable, there shall be collected, as a part of the tax interest on such amount at the rate of 6% per annum for the period beginning with the date on which such amount is payable and ending with the date on which it is paid."

The Commissioner's regulations with respect to this statutory provisions read as follows:

> "If the taxpayer elects in accordance with the conditions prescribed to extend the time for the payment of such portion of the tax for the taxable year 1943, *interest on the amount with respect to which the extension applies is not payable for the period of the extension.* If, however, such amount is paid after the termination of such period, there shall be collected as part of the tax interest at the rate of 6 per cent per annum for the period *beginning with the date on which such amount is payable* under the extension and ending with the date upon which it is paid." (Italics ours.) (TD 5300, Sec. 36.9, Cum. Bul. 1943 p. 43.)

There is no question but that the persons who elected to take advantage of the extension had an advantage over those who did not elect to do so in that they had the use of their money over the period of extension, and it might well have been argued that interest should have been charged from the due date of the return in order to equalize the situation between those taxpayers who elected to take advantage of the extension and those who did not, but no effort was made to avoid this possible discrimination. We respectfully submit that inasmuch as all taxpayers were extended the same election under Section 710(a)(5) there was no need to consider whether those who did elect had an advantage over those who did not elect or *vice versa,* and there is no more reason for being concerned about the possible advantages or disadvantages between persons who did elect under Section 710(a)(5) and those who did not, than for being concerned about the possible advantages or disadvantages

between persons who did elect to take the extension granted under Section 6(e)(1) of the Current Tax Payment Act of 1943, and those who did not. Congress was not concerned by those possible differences in the latter situation so it can well be assumed that Congress was not concerned by those possible differences in the former situation, and the statute was written accordingly.

When Section 292(b) was under consideration, Congress could very easily have provided that deficiencies resulting from deferment of tax under Section 710(a)(5) shall bear interest from the due date of the return had Congress so intended. Since the Congress did nothing about the matter it must be assumed that Congress was satisfied that the proper answer would be obtained through the application of the general statutory provisions relating to deficiencies and the assessment of interest thereon. As hereinbefore established, under these general statutory provisions (Section 272(b) and (c), and Section 292(a) Internal Revenue Code) interest did not begin to run on the $135,203.36 deferred by plaintiff under Section 710(a)(5) until the date prescribed for the payment thereof and the only date prescribed for the payment thereof was the date of notice and demand from the Collector. This was the decision of the Court below. The decision is correct and should be sustained.

RESPONSE TO APPELLANT'S BRIEF.

The appellee is in a quandary as to just what the Government's argument really is in this appeal from the District Court's decision. On page 8 of his brief, appellant states, "We believe that the District Court misinterpreted Section 292(b) of the Code, for the reasons that (1) the Section applied only where relief under Section 722 was granted and (2), if it were otherwise, excess profits taxes deferred under Section 710(a)(5) are specifically excluded from the non-interest provisions of Section 292(b)", and on page 11 of his brief he concludes, "As the claim for relief under the provisions of Section 722 involved here was rejected by the Commissioner the determination of the deficiency in excess profits tax did not result from relief under Section 722, and Section 292(b) is not applicable." These quotations give the impression that the District Court based its decision on Section 292(b), but the Court did not base its decision on that Section. In fact the Court first concluded that Section 292(b) did not contain the answer to the questions presented, before it decided the case in favor of the taxpayer.

In the Court below, the taxpayer argued as hereinbefore argued, that the answer to the issue involved in this case must be found, not in Section 292(b), but in the statutes which deal generally with the matter of when taxes become payable and the period from which interest on taxes is to be charged. The Court below, in disposing of Section 292(b) which it considered very carefully because of the Government's contention before that Court that Section 292(b) and its

legislative history supported the assessment of the interest collected on the deferred payment, concluded —"It merely says that a deficiency portion of a deferment under Section 710(a)(5) shall not be freed of interest until a date as late as September 16, 1945. It says no more." (R. 90.) The Court below also stated, "Plaintiff says that according to the clear statement of the law the interest does not begin until it is payable. The Senate Committee report does not disagree with that contention. The House Committee report in no wise disagrees with that contention. I am satisfied that the law is as plaintiff contends, that interest was not chargeable until the deferred deficiency became payable. Under the law the deferred deficiency became payable in September, 1944, when the Commissioner demanded payment." (R. 93.) And again, the Court below in sustaining plaintiff's position stated, "The contention of the plaintiff is easily followed, that the statute provides that the interest starts when the amount becomes payable. The amount became payable on September 30, 1944. My decision must be to that effect. So construing the clear language of the statute, the legislative history is likewise consistent and logical. * * * Neither the Act nor the legislative history calls for interest for any period before the deferred amount became payable."

It is the taxpayer's understanding of the decision of the Court below that the Court held that the general statute relating to liability for, and payment of the deferred tax, and to the imposition of interest on such tax, did not require that interest be charged for any

period prior to the date of notice and demand from the Collector, and that there is nothing in Section 292(b) which changes the effect of these general statutory provisions. The Government in arguing that Section 292(b) does not apply offers no answer to the Court's decision that under the general statutory provisions no interest is collectible until the date the deferred tax becomes payable.

The first eleven pages of the Government's brief leave the impression that the Government's position depended upon showing that Section 292(b) did not apply to this case, which, as just stated above, is difficult to understand in view of the fact that the Court below did not base its decision upon Section 292(b). On page 12 of the Government's brief, however, it is stated,—"Even if this Court should conclude that Section 292(b) may apply where relief is denied, judgment in this case should be reversed for the reason that the section specifically excludes from nonpayment of interest excess profits taxes deferred," and the Government concludes on page 14 of its brief, "We submit that the pertinent portion of Section 292(b) of the Code requires that interest be collected on the deficiency of excess profits taxes deferred under Section 710(a)(5)." There is nothing in the Government's brief which supports the conclusion that Section 292(b) of the Code requires that interest be collected on the deferred tax from the filing date of the return. The Court below gave about as thorough an analysis of Section 292(b) as can be submitted, before reaching the inevitable conclusion that, "It merely says that a

deficiency portion of a deferment under Section 710(a)(5) shall not be freed of interest until a date as late as September 16, 1945. It says no more." (R. 90.)

The taxpayer might well conclude this refutation of the Government's argument by the bare statement that the Government has submitted nothing to establish the proposition that interest should be collected from the filing date of the return on which the deferment was claimed. However, on page 13 of its brief the Government emphasizes a contention that unless its position is upheld serious inequities will result. Since this argument directed to equitable and practical considerations is absolutely without merit, it must be given some attention to point out wherein it can be of no consequence in this case. The very example given by the Government on page 13 of its brief practically answers the argument all by itself. The Government states presumably as an example of inequity, "Those taxpayers who paid the tax were deprived of the use of their money and, where the application was granted, received no interest thereon." The Government's statement just quoted might be better understood when reduced to a hypothetical example:

> "Assume two taxpayers in an identical situation, each filing in March 1943 a claim for relief under Section 722, one of the taxpayers deferring \$30,000 of tax under Sec. 710(a)(5) and the other making no deferment but paying the full tax upon filing of the return. Assume both claims are allowed in June 1945 to the extent of \$30,000.

> The first taxpayer's right to the $30,000 which it had deferred becomes absolute; the second taxpayer is entitled to a refund of $30,000. There can be no dispute that where the refund is made to the second taxpayer, *the taxpayer will not be paid interest on the overpayment.*" (Sec. 3771(g) Internal Revenue Code.)

This example is a correct statement of the effect of the law as Congress enacted it. It is obvious that from the point of view of logic there is a discrimination in this situation as has already been mentioned in this brief, Supra, pp. 13-19, in that the first taxpayer has been able to utilize the $30,000, payment of which he deferred, from March 1943 until June 1945, whereas the second taxpayer has been deprived of any earning on such a sum for that period since it has paid it over to the Government in 1943. *And yet Congress apparently did not believe that this situation reflected a discrimination which justified any special relief or the payment of interest to the second taxpayer.* If the Government, by citing this example, is intending to suggest that interest should be collected under Section 292(b) on the deferred payment even where the relief claim has been allowed and therefore no liability for the deferred tax has ever arisen, in order to correct this "inequity" when compared with the taxpayer who paid his tax instead of deferring it, the Government's argument is irrational in attempting to charge interest on something for which the taxpayer was never liable, especially when it is kept in mind that every taxpayer in the class entitled to defer a

tax, had the right of election to claim the deferment. As hereinbefore pointed out, this is not the first time that Congress refused to recognize advantages or disadvantages with respect to interest charges in particular situations as being discriminatory. (Supra, p. 19.) Since Congress did not consider this advantage or disadvantage with respect to interest as being discriminatory, any argument made by the Government based on the premise that this situation is discriminatory must necessarily fail.

The appellant cites the case of *Jones v. Johnson*, 176 F. (2d) 693 (C.C.A. 10th) which, so far as appears from the record, holds that the filing or rejection of a Section 722 claim does not relieve the taxpayer from liability for interest on an ordinary tax deficiency resulting from adjustments which had nothing to do with Section 722, or the claim for relief filed under that Section. The case neither involved nor considered the matter of interest on taxes deferred under Section 710(a)(5), and has no applicability to this case.

The case of *California Vegetable Concentrates, Inc.* (1948), 10 T.C. 1158 (to which the Commissioner of Internal Revenue expressed acquiescence in Cum. Bul. 1948-2, p. 1), which though not involving the interest question involved in this case, did involve a question which made it necessary to go into a comprehensive analysis of the status of the tax deferred under Section 710(a)(5), and in that analysis the Tax Court reached conclusions which are in harmony

with the contentions advanced by the taxpayer in this case. The following is a brief analysis of that case:

In that case the petitioner filed with its excess profits tax return a claim for relief under Section 722 and under Section 710(a)(5) reduced the amount payable by 33% of the amount of the claim. The Commissioner audited the return and included in the total tax and the proposed tax deficiency, the amount deferred under Section 710(a)(5). No final action had yet been taken on the claims for relief. The taxpayer contended that the amount deferred under Section 710(a)(5) should not be considered part of the total tax and should not be treated as a deficiency until after the claims for relief had been considered and acted upon by the Commissioner. The Tax Court sustained the taxpayer pointing out:

> "The deficiencies determined by the Respondent, however, do not reflect the reduction in 'tax payable at the time prescribed for payment', that is, they defer no part of the adjusted excess profits tax liability. * * *"
>
> "It is obvious, therefore, that if this Court approves the respondent's view and does not exclude the 33 per cent of the amount claimed under Section 722, from the deficiency here being redetermined, the Commissioner may assess it and is, therefore, able to demand payment—and the taxpayer will have secured only temporarily the immunity from assessment, that is, deferment of the 33 per cent granted deferment under Section 710(a)(5) * * *."

> "Section 710(a)(5), it seems to us, clearly provides deferment until the completion of the determination of the claim under Section 722, for the deferment is provided only under certain circumstances for one who files a claim under Section 722, and it seems apparent that the object in view was to recognize that such a taxpayer filing a claim for relief under Section 722, and the adjusted excess profits net income of which was more than 50 per cent of its normal tax net income, should be considered sufficiently likely to prevail at least to some extent on its claim that it would be only fair to let such taxpayer retain 33 per cent of the amount of such claim, until final adjustment thereof. To permit the deferment only until the Commissioner could issue a deficiency notice (prior to Section 722 procedure) and collect thereon is not in line with the obvious intent of the statute * * *."

The Tax Court stated that final action on the Section 722 claim

> "is clearly a determination of the amount of tax liability of the taxpayer, for it either allows, or, in whole or in part, disallows the relief asked for under Section 722 and, so far as the deferred 33 per cent is concerned, determines that there is, or is not, tax liability therefor. In our view, such is the *first* determination of the taxpayer's liability for 33 per cent * * *."
>
> "Section 722(d) provides, in connection with relief under Section 722, that the taxpayer shall compute its tax, file its return and pay the tax shown thereon, without application of Section

> 722, 'except as provided in Section 710(a)(5)'. From all of the above we conclude that Congress did not intend that the taxpayer should be liable for the 33 per cent until completion of Section 722 procedure and as a part of the deficiency, if any, then determined".

It is respectfully submitted that the above case supports the taxpayer's position in this case that

(1) The taxpayer was not liable for the deferred tax at the time the return was due.

(2) The deferred tax was not payable at the time the return was due.

(3) The taxpayer became liable for the deferred tax only when the Commissioner took action on the Section 722 claim.

(4) The time "prescribed for payment" of the deferred tax is the time the Commissioner acts on the Section 722 claim, or the date of the Collector's Notice and Demand for payment issued pursuant to such action.

We respectfully submit that appellant has not shown wherein the Court below erred either in the decision or in the conclusions of law on which the decision was based. The decision of the Court below is correct and should be sustained.

CONCLUSION.

The Court below, after concluding that the deferred tax became payable upon notice and demand from the Collector, and that interest started to run only after the tax became payable, summed up the case very nicely in these words:

> "* * * I may say that if Congress had intended that deferment intended to be an aid to the taxpayer was to bear interest not from the time the deferment became payable but from the time the tax would have been payable if there had been no deferment, Congress could have so provided. This Court cannot supply that lacking legislation." (R. 94.)

It is respectfully submitted that the Judgment of the Court below should be affirmed.

Dated, San Francisco, California,
January 27, 1950.

Respectfully submitted,
George H. Koster,
Robert H. Evans,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Sec. 729. Laws Applicable

(a) General Rule. All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

Sec. 53. Time and Place for Filing Returns

(a) Time for Filing—

(1) General Rule. Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

Sec. 56. Payment of Tax

(a) Time of Payment. The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) Installment Payments. Except in the case of an individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made ap-

plicable), the taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

Sec. 710(a)(5). Deferment of Payment in Case of Abnormality

If the adjusted excess profits net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26(e) (relating to adjusted excess profits net income) the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return.

Sec. 271(a) Definition of Deficiency

In General. As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means

the amount by which the tax imposed by this chapter exceeds the excess of——

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over * * *

(2) the amount of rebates, as defined in subsection (b)(2), made.

SEC. 271(b) RULES FOR APPLICATION OF SUBSECTION (a)

For the purposes of this section——

(1) The tax imposed by this chapter and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 35, and without regard to so much of the credit under section 32 as exceeds 2 per centum of the interest on obligations described in section 143(a);

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a)(1) over the amount of rebates previously made; and

(3) The computation by the collector, pursuant to section 51(f), of the tax imposed by this chapter shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

SEC. 272. PROCEDURE IN GENERAL

(b) COLLECTION OF DEFICIENCY FOUND BY BOARD. If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) FAILURE TO FILE PETITION. If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

SEC. 292. INTEREST ON DEFICIENCIES

(a) GENERAL RULE. Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected

as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

(b) Deficiency Resulting From Relief Under Section 722. If any part of a deficiency for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be assessed or paid with respect to such part of the deficiency. If any part of a deficiency for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year (excluding any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under section 710(a)(5), and excluding, in case the taxpayer has availed itself of the benefits of section 710(a)(5), such portion of a deficiency under Chapter 1 as may be determined by the Commissioner to exceed any refund or credit of

excess profits tax arising from the operation of section 722), no interest shall be assessed or paid with respect to such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.

SEC. 3771. INTEREST ON OVERPAYMENTS

(g) CLAIMS BASED UPON RELIEF UNDER SECTION 722. If any part of an overpayment for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment. If any part of an overpayment for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.